**NG CHAI (F)**

**v.**

**TAN SEE @ TAN AH KIAN**

HIGH COURT MALAYA, SHAH ALAM
DATO' MAHADEV SHANKAR J.
[CIVIL SUIT NO. 22-166-90]
21 FEBRUARY 1994

***CONTRACT: Specific performance - Defendant applying to authorities for sub-division of his land in accordance with lay-out plan - Plaintiff entering into agreement to purchase two shoplots - Express provision in agreement that sale subject to approval of plan - Authorities not approving plan as submitted - Plaintiff claiming specific performance - Defendant claiming non fulfilment of condition precedent and frustration of contract - Whether plaintiff entitled to specific performance.***

The defendant, the registered proprietor of a piece of land in the Mukim of Batang Berjuntai, applied to the authorities for sub-division of the land in accordance with a specific lay-out plan. On 10 August 1977 the plaintiff entered into a sale and purchase agreement to purchase 2 shoplots from the defendant. The agreement *inter alia* expressly provided that the lots would only be sold "upon the approval of the said plan". Subsequently, the authorities did not approve the plans as submitted but substituted its own plan for the said plan. The defendant failed to go through with the sale of the two lots and the plaintiff claimed for specific performance.

The defendant contended that there was non fulfilment of the condition precedent of the agreement as regards the approval of the plan and further that the contract had been frustrated by the refusal of the authorities to approve the said plan. The plaintiff contended that as the authorities had approved 6 out of the original 11 shoplots, she was entitled to 2 shoplots under paragraph 8 of the agreement.

**Held:**

**[1]** The plaintiff's submission completely overlooked the fact that the clear words of the agreement made it necessary not just for the approval of the sub-division of the land but a sub-division, "in accordance with the lay-out plan annexed" to the said agreement. This did not happen and for this reason this claim was misconceived.

**[2]** The defendant was entitled to retain the sum deposited by the plaintiff when the agreement was executed and set it off against the taxed costs and recover the balance of the costs from the plaintiff.

*[Plaintiff's application dismissed with costs to be taxed].*

**Case referred to:**
*Mosbert Bhd. (In Liquidation) v. Stella D'Cruz [1985] 2 MLJ 446* ***(cit)***

**Legislation referred to:**
National Land Code (Amendment) Act 1984, s. 446

*For the plaintiff - T.K. Lee; M/s. A.K. Lee & Co.*
*For the defendant - L.H. Lee; M/s. S.Y. Lai & Associates*

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## JUDGMENT

**Mahadev Shankar J:**
I dismissed this claim for specific performance for the following reasons.

On 10 August 1977 the plaintiff entered into a written sale and purchase agreement with the defendant.

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The defendant was the registered proprietor of the land held under EMR No. 2343 for Lot No. 368 in the Mukim of Batang Berjuntai in area 4 acres 1 rood only (hereafter called "the said land"). The defendant had applied to the appropriate authority for sub-division of the said land in accordance with a specific lay-out plan (hereafter referred to as the said plan).

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The plaintiff agreed to purchase two lots in the said plan (the said lots). In the agreement the said lots were referred to as such and delineated in red in the said plan which was attached to the said agreement.

It was an express provision in the said agreement that the vendor would only sell and the purchaser agree to purchase the said lots "upon the approval of the said plan".

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The said plan proposed eleven shop-lots covering an area of 17,600 sq. feet running adjacent to the southern boundary of the said land with a set-back of 20 feet from the main public road from Kuala Selangor to Rawang. The said lots were at the south-eastern corner of the said plan.

The relevant authorities did not approve the said plan as it was submitted. Eleven proposed shop-lots were reduced to six shop lots. These shop lots were now set back 100

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feet from the southern boundary and moved to about the western boundary of the said land. Originally fifty-two terrace houses were proposed. The approved plan only allowed forty-three terrace houses and these were aligned in a totally different way from the said plan. In other words the approving authority substituted its own plan for the said plan.

Two defences were taken. The first was that it was a condition precedent to the said

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contract that the said lay-out plan should be approved. Second that the contract had been frustrated by the refuse of the relevant authority to approve the said plan.

The plaintiff contends that since the appropriate authority had approved the sub-division of the said land, she is entitled to specific performance and insists that the defendant should give the plaintiff two out of the six shop lots approved. She claims that the words in the said agreement to the effect that, "the extent of the said lots and its

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position in relation to the other lots described on the said plan annexure may not be exactly as presented when the deed or deeds of title covering the said lot is or are finally issued by the appropriate authority and shall be adjusted as contained in paragraph 8 hereof", permits this because paragraph 8 of the said agreement provides:

> In the event of the issue of separate titles to the said lot the purchaser agrees to pay to

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> the vendor for the excess in area of the said lots at the rate of RM4.50 or *vice-versa* the vendor shall compensate the purchaser for any diminution of area at the same rate aforesaid.

This submission completely overlooks the fact that the clear words of the said agreement makes it necessary not just for the approval of the sub-division of the said land but a sub-division, "in accordance with the lay-out plan annexed" to the said agreement i.e. the

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said plan.

This did not happen and for this reason this claim is misconceived.

The plaintiff caveated the whole of the said land before she filed this action. However the validity of this caveat is not the subject of the present pleading and therefore I did not concern myself with *Mosbert Bhd. (In Liquidation) v. Stella D'Cruz* [1985] 2 MLJ or s. 446 or the National Land Code (Amendment) Act 1984.

Finally the plaintiff had paid a deposit of RM1,440 when the said agreement was executed. The defendant attempted to return this money to the plaintiff before this action was filed but the plaintiff refused it and proceeded with this case.

The costs of this action will far exceed the amount of this deposit. I therefore ordered that the defendant be entitled to retain this money and set it off against the taxed costs. The defendant will thus have to give credit to the plaintiff for the amount of the deposit and recover the balance of the costs only.